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Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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IN RE ENRON CORPORATION : Consolidated Civil Action
SECURITIES LITIGATION : No. H-01-3624
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This Document Relates To:

MARK NEWBY, et al., individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

ENRON CORPORATION, et al.,

Defendants.

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THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA, et al., individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

KENNETH L. LAY, et al.,

Defendants.

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**MOTION OF MERRILL LYNCH FOR CLARIFICATION
OF JUNE 27, 2003 ORDER CONCERNING PSLRA DISCOVERY STAY**

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Co., Inc. and Merrill Lynch, Pierce, Fenner &
Smith Incorporated

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Defendants Merrill Lynch & Co., Inc. and Merrill Lynch, Pierce, Fenner & Smith Incorporated (collectively, “Merrill Lynch”) respectfully submit this motion seeking clarification of the June 27, 2003 order in which the Court ruled that the discovery stay imposed by the Private Securities Litigation Reform Act (“PSLRA”) no longer applied to *any* of the defendants. Specifically, because the reasoning of the June 27 Order does not appear to contemplate Merrill Lynch’s particular circumstances in this litigation, Merrill Lynch asks the Court to confirm that the stay remains in effect as to Merrill Lynch pending resolution of its motion to dismiss filed on June 18, 2003.

In finding the PSLRA discovery stay no longer operative, the Court concluded that “the survival of claims against all current Defendants in the consolidated actions beyond the initial round of motions to dismiss has established that Lead Plaintiff has stated claims against *each one of them* and is entitled to go forward.” See June 27 Order at 1 (emphasis added).

This is not so, however, as to Merrill Lynch. The Court noted the inadequacy of Lead Plaintiff’s initial claims against Merrill Lynch in its December 20, 2002 ruling on certain motions to dismiss, finding that Lead Plaintiff’s “conclusory allegations” against Merrill Lynch were “insufficient to create a strong inference of scienter,” and that “[t]he complaint fails to assert any specific facts to give rise to actual knowledge of or reckless disregard of fraud.” See December 20 Order at 293-94. While the Court ruled in its December 20 Order that Lead Plaintiff would be permitted to supplement its allegations against Merrill Lynch in an effort to state actionable claims, the Court also noted in a January 23, 2003 order that “Merrill Lynch [would] have an opportunity to challenge the adequacy of that new pleading through another motion to dismiss.” See January 23 Order at 3.

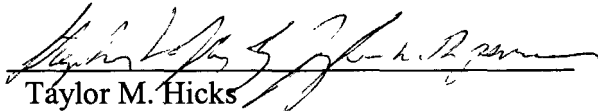
The PSLRA of course provides that “all discovery ... shall be stayed during the pendency of any motion to dismiss.” See 15 U.S.C. § 78u-4(b)(3)(B). Congress intended to permit discovery against a defendant “*only after the court has sustained the legal sufficiency of the complaint.*” See SG Cowen Securities Corp. v. United States Dist. Court for the Northern Dist. of Cal., 189 F.3d 909, 912-13 (9th Cir. 1999) (citing legislative history of PSLRA discovery stay

provision) (emphasis in original). Given the plain language of the PSLRA, and because no complaint has been sustained to date against Merrill Lynch, the discovery stay should remain in effect until such time that the Court rules upon Merrill Lynch's pending motion to dismiss.

CONCLUSION

Based on the foregoing, Merrill Lynch respectfully requests that the Court clarify the June 27 Order and confirm that the PSLRA discovery stay remains operative as to Merrill Lynch pending resolution of Merrill Lynch's motion to dismiss Lead Plaintiff's claims in their entirety.

Respectfully submitted,

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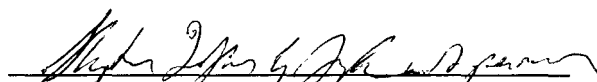
COUNSEL FOR DEFENDANT

**MERRILL LYNCH & CO., INC. and MERRILL
LYNCH, PIERCE, FENNER & SMITH INC.**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **Motion of Merrill Lynch for Clarification of June 27, 2003 Order Concerning PSLRA Discovery Stay** was served upon all known counsel of record by website, <http://www.esl3624.com>, pursuant to the Court's Order dated August 7, 2002 (Docket No. 984), on this the **9th** day of **July, 2003**.

Please See Attached Service List



Stephen M. Loftin

The Service List

May be Viewed

in the

Office of the Clerk